Supreme Court, U.S.
FILED
JUN 23 1994
CLERK

No. 93-1875

In The

Supreme Court of the United States

October Term 1993

R.H. RISON, ET AL.,

Petitioners,

v.

JOHN DEMJANJUK,

Respondent.

BRIEF OF JERROLD NADLER, HOLOCAUST SURVIVORS IN PURSUIT OF JUSTICE, INC. AND WORLD JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ELIZABETH HOLTZMAN
Counsel of Record
Herrick, Feinstein
2 Park Avenue
New York, NY 10016
(212) 684-1400

SANFORD HAUSLER
1568 59th Street
Brooklyn, NY 11219
(718) 633-0847

Attorneys for Amici Curiae

June 22, 1994

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-3120

QUESTIONS PRESENTED

1. Does the "stigma" of an extradition order, without any other collateral legal consequences, justify an exception to the mootness doctrine, allowing the Sixth Circuit to vacate the extradition order, when the extradition has already been effected and the foreign prosecution resulted in a reversal of the accused's conviction?

2. If *Brady v. Maryland* is applied to extraditions, does it require the production of exculpatory evidence that is inadmissible and unlikely to lead to admissible evidence because of the narrow scope of extradition hearings or should the nature of extradition hearings be radically restructured to allow such evidence to be admitted?

3. Given the federal courts' special duty to reject ethnic stereotypes in the judicial process, should a Court of Appeals' decision, which suggests that political pressure applied by Jews and Jewish groups led to the Government's withholding of exculpatory evidence, be allowed to stand when the Court's Special Master's conclusion that the opposite was true was not found to be clearly erroneous?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

PROCEDURAL BACKGROUND 3

REASONS FOR GRANTING THE WRIT 8

I. THE SIXTH CIRCUIT HAS ADDED A "STIGMA" EXCEPTION TO THE CONSTITUTIONAL DOCTRINE OF MOOTNESS 8

II. IN APPLYING *BRADY V. MARYLAND* TO AN EXTRADITION CASE FOR THE FIRST TIME, THE SIXTH CIRCUIT BROADENED *BRADY* TO REQUIRE THE PRODUCTION OF EVIDENCE IRRELEVANT TO PROBABLE CAUSE 12

III. THE SIXTH CIRCUIT'S CHARACTERIZATION OF CONTACTS BETWEEN THE JUSTICE DEPARTMENT AND JEWISH GROUPS AND INDIVIDUALS WARRANTS REVIEW BY THIS COURT 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases *Pages*

Ahmad v. Wigen, 726 F.Supp 389 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir. 1990) 9

Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) 6

Batson v. Kentucky, 476 U.S. 79 (1986) 19

Brady v. Maryland, 373 U.S. 83 (1963) i, 2, 6, 7, 8, 12, 14, 15, 16

Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981) 15

Carafas v. LaVallee, 391 U.S. 234 (1968) 10

Charlton v. Kelly, 229 U.S. 447 (1913) 9, 12

Collins v. Loisel, 259 U.S. 309 (1922) 12, 13

Demjanjuk v. Israel, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993) 3, 4

Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) 4, 5, 7, 8, 9, 13, 17, 18

Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 3, 7, 8, 9, 13, 14

Demjanjuk v. Petrovsky, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993) 5, 7

Fernandez v. Phillips, 268 U.S. 311 (1925) 14

First National City Bank of New York v. Aristeguiesta, 287 F.2d 219 (2d Cir. 1960), *vacated for mootness*, 375 U.S. 49 (1963) 14

Fiswick v. United States, 329 U.S. 211 (1946) 9. 10

Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977) 13

Georgia v. McCollum, 112 S. Ct. 2348 (1992) 19

In re Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984) . . 12, 14

In re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985) 3

In re Koskotas, 127 F.R.D. 13 (D. Mass. 1989) 14, 15

In re Luis Oteiza y Cortes, 136 U.S. 330 (1890) 14

In re Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) 12

In re Singh, 123 F.R.D. 108 (D.N.J. 1987) 15

Indian Head National Bank of Nashua v. Bruelle, 689 F.2d 245 (1st Cir. 1982) 6

Israel v. Demjanjuk, Crim. Case (Jerusalem) No. 373/86 (April 18,1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29,1993) 3, 4

Kearns v. Turner, 837 F.2d 336 (8th Cir. 1988) 11

Lewis v. Continental Bank Corp., 110 S. Ct. 1249 (1990) . . . 9

Merino v. United States Marshal, 326 F.2d 5 (9th Cir. 1963) 16

North Carolina v. Rice, 404 U.S. 244 (1971) 9

Oil Workers Unions v. Missouri, 361 U.S. 363 (1960) 9

Peryea v. United States, 782 F. Supp. 937 (D. Vt. 1991), *aff'd w/o opn.*, 970 F.2d 896 (2d Cir. 1992) 15

Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499 (E.D. Wis.), *aff'd w/o opn.*, 588 F.2d 838 (7th Cir. 1978) 6

Shapiro v. Ferrandina, 355 F. Supp. 563 (S.D.N.Y.), *modified*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) 13

Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) 12

Sibron v. New York, 392 U.S. 50 (1968) 10

St. Pierre v. United States, 319 U.S. 41 (1943) 10

Taft v. Donellan Jerome, Inc., 407 F.2d 807 (7th Cir. 1969) . . 6

Teltronics Services, Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd sub nom. Anaconda-Ericsson, Inc. v. Hessen* (*In re Teltronics Services, Inc.*), 762 F.2d 185 (2d Cir. 1985) 6

United States ex rel Aigner v. Shaughnessy, 175 F.2d 211 (2d Cir. 1949) 6

United States ex rel. Karadzole v. Artukovic, 170 F. Supp. 383(S.D. Cal. 1959) 14

United States v. Bagley, 473 U.S. 667 (1985) 15

United States v. Case, 684 F. Supp. 109 (D.N.J. 1988), *aff'd w/o opn*, 866 F.2d 1413 (3d Cir. 1988) 11

United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982) 3, 9

United States v. Keane, 852 F.2d 199 (7th Cir. 1988) 10

United States v. Loftus, 796 F. Supp. 815 (M.D. Pa. 1992) . . 10

United States v. Philip, 948 F.2d 241 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992) 15

United States v. Taitz, 134 F.R.D. 288 (S.D. Cal. 1991) 14

Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511 (4th Cir. 1987) 6

Statute and Rules

Federal Rule of Civil Procedure 53(e)(2) 17

Federal Rule of Civil Procedure 60(b) 6, 7

8 U.S.C. § 1182(a)(3)(E)(i) 5

18 U.S.C. § 3190 14

Miscellaneous

M. Bassiouni, *International Extradition: United States Law and Practice* (2d rev. ed. 1987) 12

In The

Supreme Court of the United States

October Term 1993
No. 93-1875

R.H. RISON, ET AL.,

Petitioners,

v.

JOHN DEMJANJUK,

Respondent.

BRIEF OF JERROLD NADLER, HOLOCAUST SURVIVORS IN PURSUIT OF JUSTICE, INC. AND WORLD JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Upon consent of all parties to this action, *amici curiae* submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") of petitioners (the "Government").

INTEREST OF AMICI

Amicus Jerrold Nadler is a member of the House of Representatives, representing the Eighth Congressional District of New York. Nadler sits on the Subcommittee on International Law, Immigration and Refugees of the House Judiciary Committee and, in this capacity, has a special interest in seeing that the immigration and extradition laws are not circumvented by improper judicial action.

Amici Holocaust Survivors and Friends in Pursuit of Justice, Inc. and the World Jewish Congress (the "Organizational *Amici*") are Jewish organizations whose purpose is, in large part, to combat anti-Semitism. They are concerned with bringing to justice those who persecuted Jews during the Nazi era and believe it is fully within their rights to communicate with the Justice Department and other parts of the Legislative or Executive branches of government to urge government action that is consistent with the purposes for which they exist. They believe that the Sixth Circuit's decision incorporates stereotypes of Jews which have no place in a judicial decision and create potential adverse consequences for the exercise of their right to communicate with the government. For this reason, the Organizational *Amici*, along with Nadler, raise the issue in this brief.

Amici concur with the position taken in the Petition. In addition, *amici* believe this Court should address the issue of the Sixth Circuit's jurisdiction and the implications for extradition procedure of the Sixth Circuit's improper application of the *Brady* doctrine. As these issues were not fully briefed by the Government, *amici* believe that this brief will be of use to the Court.

PROCEDURAL BACKGROUND

This case involves the extradition of Ivan (John) Demjanjuk ("Demjanjuk"), who was sent to Israel[1] on charges that he had committed multiple acts of murder while serving as a guard at the Treblinka death camp.[2] The district court found probable cause to believe that Demjanjuk had committed these crimes based on eyewitness affidavits of three Treblinka survivors, who identified Demjanjuk as a Treblinka guard they knew as Ivan, and ordered his extradition. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 552, 566 (N.D. Ohio 1985).

Demjanjuk unsuccessfully challenged the extradition order in a habeas corpus proceeding. *Demjanjuk v. Petrovsky*, 612 F. Supp.

---

1 Citations to the Israeli District Court decision, *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 15, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), will be to the published translation found in *The Demjanjuk Trial* (A. Landau ed. 1991). Citations to the Israeli Supreme Court decision, *Demjanjuk v. Israel*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), will be designated Isr. Sup. Ct. ¶ __. Citations to the Special Master's Report will be designated S.M. Rep. __.

2 Demjanjuk had previously been denaturalized and ordered deported based on his misrepresentation and concealment of his wartime service and activities at the Treblinka death camp and the SS camp at Trawniki. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982). The Government also presented documentary evidence at the denaturalization hearing that Demjanjuk had been an SS guard at the Sobibor death camp; however, the denaturalization court declined to rule on that ground because it found that service at either Treblinka or Trawniki was sufficient grounds for denaturalization. *Id.* at 1376 n.31. At Demjanjuk's criminal trial in Israel, further evidence of his service at Sobibor and perpetration of attrocities there was introduced by Demjanjukhimself. *The Demjanjuk Trial* 325; Isr. Sup. Ct. ¶ 176. While his appeal to the Israeli Supreme Court was pending, captured Nazi documents from recently opened Soviet archives were adduced, showing that Demjanjuk had also been a guard at the Regensburg and Flossenburg concentration camps and the Lublin SS camp. Isr. Sup. Ct. ¶458, 459.

571 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) .

After a trial on the merits before the Israeli District Court, Demjanjuk was convicted of being Ivan the Terrible of Treblinka, a particularly sadistic guard and gas chamber operator, and of having taken part in the mass murder of Jews at the Sobibor death camp. *The Demjanjuk Trial* 373. On appeal, the Supreme Court of Israel, while finding the eyewitness testimony convincing, Isr. Sup. Ct. ¶ 452, was troubled by purported statements of certain deceased Treblinka guards, discovered in Soviet archives after the trial had been completed, which suggested that someone other than Demjanjuk might have been Ivan the Terrible. Although the Israeli Supreme Court recognized that the Treblinka guards' statements might not be authentic or accurate, *id.* ¶ 454, it nonetheless reversed the conviction on the ground that the statements raised sufficient doubt to foreclose Demjanjuk's conviction. The Court further stated that these statements in no way affected the factual record proving that Demjanjuk had served as a guard at the SS Trawniki camp and the Sobibor death camp and was thus "part of the extermination machine," *id.* ¶ 459, nor detracted from the documentary evidence indicating that he served at other Nazi concentration camps. *Id.* ¶ 458.

While the Israeli Supreme Court's decision was pending, the Sixth Circuit panel in the habeas corpus proceeding reopened the proceeding, *sua sponte*, to ascertain whether a fraud had been committed on the court in the procurement of the extradition order. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 357 (6th Cir., 1993). It appointed a Special Master to take evidence and report on the matter. *Id.* at 357-58.

The Special Master found that the Government had committed no fraud on the court. Although he found that certain documents should have been turned over to Demjanjuk, the Government's actions were found to be in good faith and not reckless. S.M. Rep. 193. He also stated that the denaturalization and deportation decisions remained valid (as they were based not only on Demjanjuk's alleged Treblinka service, but also on the independent

ground of his Trawniki service), S.M. Rep. 210, and he recommended that the habeas corpus proceeding be closed.

Before the Sixth Circuit had acted on the Special Master's findings, the Israeli Supreme Court reversed Demjanjuk's conviction. The Sixth Circuit then issued a writ of habeas corpus, prohibiting the Government from interfering with Demjanjuk's return to the United States, although his return appeared to violate a valid deportation order and the Holtzman Amendment.[3] *Demjanjuk v. Petrovsky*, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993).

The Sixth Circuit rejected the ultimate finding of the Special Master, holding that, regardless of its good faith, the Government had recklessly violated its obligations under *Brady* and had thus committed a fraud on the court in procuring the extradition order. 10 F.3d at 354. The court vacated that order.

Beginning with its *sua sponte* reopening of the habeas corpus proceeding, the court acted on the basis of novel legal theories, contradicted by precedents of this Court and the other circuits, or utilized unusual legal procedures. It also made a number of inaccurate or misleading factual findings.

The novel legal theories adopted by the Court include:

1. It implicitly ruled that stigma alone prevents mootness and is a sufficient predicate for a justiciable case or controversy. *See* Point I, *infra*.

---

[3] 8 U.S.C. § 1182(a)(3)(E)(i) (bars persons who "participated" in persecution under the Nazis from entering the United States). The denaturalization court's finding that Demjanjuk was a guard at Trawniki and the Israeli Supreme Court's reaffirmation of that finding and its reference to Demjanjuk's service at other Nazi death camps, including Sobibor, provide sufficient basis to exclude Demjanjuk under the statute's prohibition.

2. It decided that the rule of *Brady v. Maryland* applies in extradition and denaturalization cases where underlying criminal acts are at issue. It is the only court to so hold. *See* Point II, *infra*.

3. It implicitly ruled that *Brady* either required (1) the production of evidence which is not relevant to the probable cause showing in an extradition proceeding and therefore evidence which is not admissible in such proceedings or (2) the wholesale restructuring of extradition proceedings to make such evidence admissible. *See* Point II, *infra*.

4. It ruled that a violation of *Brady*, even one committed in good faith, constituted a fraud on the court under Rule 60(b).[4]

5. It implicitly ruled that hearsay documentary evidence submitted by the accused is admissible in an extradition proceeding. *See* Point II, *infra*.

6. It implicitly ruled that a Rule 60(b) motion may be made in a different court and a different proceeding from that in which the alleged fraud was perpetrated.[5]

The novel procedures used by the court included:

---

[4] This issue is discussed in the Petition.

[5] Every court that has considered the question has concluded that a Rule 60(b) motion, under the Federal Rules of Civil Procedure, with a few exceptions not relevant here, "must be filed in the district court and in the action in which the original judgment was entered." *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78 (5th Cir.)(footnote omitted), *cert. denied*, 399 U.S. 927 (1970). *See also Weisman v. Charles E. Smith Management, Inc.*, 829 F.2d 511, 513 (4th Cir. 1987); *Indian Head National Bank of Nashua v. Bruelle*, 689 F.2d 245, 249 (1st Cir. 1982); *Taft v. Donellan Jerome, Inc.*, 407 F.2d 807, 809 (7th Cir. 1969); *United States ex rel Aigner v. Shaughnessy*, 175 F.2d 211, 212 (2d Cir. 1949); *Teltronics Services, Inc. v. Anaconda-Ericsson, Inc.*, 587 F. Supp. 724, 729 (E.D.N.Y. 1984), *aff'd sub nom. Anaconda-Ericsson Inc. v. Hessen (In re Teltronics Services, Inc.)*, 762 F.2d 185 (2d Cir. 1985); *Porcelli v. Joseph Schlitz Brewing Co.*, 78 F.R.D. 499, 500 (E.D. Wis.), *aff'd w/o opn.*, 588 F.2d 838 (7th Cir. 1978).

1. Citing press reports, it reopened the habeas corpus proceeding *sua sponte* to consider whether, under Rule 60(b), a fraud on the court had been committed by the Government in the extradition proceeding. 10 F.3d at 357.

2. It bypassed the extradition judge and appointed another judge as Special Master to report on the issue of fraud, claiming that remand would be a "cumbersome and dilatory procedure." 10 F.3d at 358. However, it previously ruled that the denaturalization judge should handle the extradition proceeding because "[j]udicial economy is served by requiring a judge familiar with the case to consider collateralattacks on the judgment." 776 F.2d at 571.[6]

3. Before deciding the case, it issued a writ of habeas corpus, *Demjanjuk v. Petrovsky*, Docket No. 85-3435, slip opn. (6th Cir. Aug. 3, 1993), prohibiting the Government from interfering with Demjanjuk's return to the United States despite the fact that a valid deportation order was in effect against him and his entry was prohibited by the Holtzman Amendment.

In addition, the Sixth Circuit made a number of factual findings that were inaccurate or misleading:

1. It found that the Government should have produced the Polish Main Commission Article to Demjanjuk prior to the denaturalization hearing. 10 F.3d at 351. However, the article was produced to Demjanjuk in 1982, three years before the extradition hearing, Petition at 13 n.10, 20 n.16, and, in any event, could not form the basis of a *Brady* violation in the extradition. *See* Point II, *infra*.

2. It found that the Government's failure to produce the Otto Horn Memoranda, which might have been used to undermine the credibility of Horn, an SS nurse at Treblinka, as a witness,

---

6 The district judge had presided at Demjanjuk's denaturalization, extradition and habeas corpus proceedings. The Special Master had no previous experience with this case.

constituted a *Brady* violation. 10 F.3d at 351. Horn's identification of Demjanjuk, however, was not introduced at his extradition proceeding, and thus the memoranda could not form the basis of a *Brady* violation in the extradition. Petition at 20 n.16. *See also Demjanjuk*, 612 F. Supp. at 566 (probable cause showing rested on survivor affidavits).

3. It cited a lecture tour in Israel by Allan Ryan, Jr., the former director of the United States Justice Department's Office of Special Investigations ("OSI") on behalf of the Anti-Defamation League of B'nai B'rith ("ADL") as an example of Jewish influence on OSI. The lecture tour, however, took place three years *after* Ryan had left OSI. *See* Point III, *infra*.

4. It mischaracterized the substance of Treblinka guard Malagon's statement, asserting that Malagon identified Demjanjuk's picture as that of a cook at Treblinka, not as Ivan the Terrible. 10 F.3d at 350. Malagon, however, stated: "Here, from what other guards (whose names I do not remember) said, I learned that Ivan Demedyuk o[r] Ivan Dem'yanyuk, who had worked as a cook at Treblinka, *had been transferred to work as a gas chamber driver*." *Id.* at 366 (emphasis added).

In taking these actions, based in part on these factual errors, the Sixth Circuit has acted contrary to numerous decisions of this Court and other circuits. As shown below, the issues involved in this case warrant this Court's review. Therefore, this Court should grant the Petition and reverse the decision of the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

I.
THE SIXTH CIRCUIT HAS ADDED A "STIGMA" EXCEPTION TO THE CONSTITUTIONAL DOCTRINE OF MOOTNESS

In finding that there was a live case or controversy in this case, the Sixth Circuit has engrafted a new exception onto the

constitutional doctrine of mootness. Such an exception is in conflict with the decisions of this Court and other circuits and, thus, warrants review.

As this Court has repeatedly stated, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). *See also Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990); *Oil Workers Unions v. Missouri*, 361 U.S. 363, 367 (1960). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial or appellate." *Lewis*, 110 S. Ct. at 1253.

The Sixth Circuit, recognizing the presence of a mootness issue, and relying on this Court's decision in *Fiswick v. United States*, 329 U.S. 211 (1946), asserted that the stigma of "being found by a court and convicted for being one of the most notorious perpetrators of Holocaust atrocities,"[7] 10 F.3d at 355, prevents this case from being

---

[7] The extradition court did *not* find that Demjanjuk was Ivan the Terrible. It merely found that "there was sufficient evidence to find probable cause" that Demjanjuk was Ivan the Terrible. 612 F. Supp. at 566. There is some suggestion that the court was referring to the finding of the denaturalization court. *See* 10 F.3d at 356 ("The extradition order was based largely on the district court's finding in the denaturalization case that Demjanjuk was Ivan the Terrible."). *Amici* assume that such is not the case because (1) the court had no jurisdiction over the denaturalization case (which had been affirmed by a different panel of the Sixth Circuit, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982) (panel consisted of Circuit Court Judges Kennedy and Martin and Senior Circuit Judge Phillips)), (2) the court specifically stated that it was attempting "to mitigate the collateral consequences of the extradition order *only*," 10 F.3d at 356 (emphasis added), (3) the probable cause finding was not based on the evidence presented at the denaturalization hearing, but rather was based on survivor affidavits which reaffirmed for the extradition court the survivors' identification of Demjanjuk, 612 F.Supp. at 566, and (4) the denaturalization was not a requirement for extradition; the United States can and has extradited its own citizens. *See Charlton v. Kelly*, 229 U.S. 447, 467 (1913); *Ahmad v. Wigen*, 726 F.Supp. 789 (E.D.N.Y. 1989) (extraditing a U.S. citizen to Israel), *aff'd*, 910 F.2d 1063 (2d Cir. 1990).

moot.[8]

But this Court has explicitly rejected the "stigma" exception in *St. Pierre v. United States*, 319 U.S. 41 (1943) (per curiam). That case involved an individual jailed for criminal contempt and sentenced to five months imprisonment. Before his case reached the Supreme Court, he was released. While St. Pierre argued that his conviction would stigmatize him, the Court dismissed the writ of certiorari, holding:

> [T]he moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review.

Id. at 43.

While subsequent decisions of this Court have allowed post-incarceration challenges to criminal convictions because such convictions entail various potential collateral legal consequences for the defendant, *see, e.g., Sibron v. New York*, 392 U.S. 50, 53-57 (1968); *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968), the central principle of *St. Pierre* — that stigma alone does not render a case adjudicable — remains untouched.

In some recent cases involving post-incarceration challenges to criminal convictions by way of a writ of error coram nobis, courts have held that stigma is not a sufficient collateral legal consequence. *See, e.g., United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988) ("Criminal convictions sometimes produce financial penalties and diminish the reputation of the defendant, but these do not entail continuing legal effects of a judgment."); *United States v. Loftus*, 796 F. Supp. 815, 827 (M.D. Pa. 1992) ("[T]he stigma of a felony

---

[8] *Fiswick* stands for no such proposition. In that case, the appeal of Fiswick's conviction was not found to be moot despite the fact that Fiswick had already served his sentence because the conviction could subject him to deportation, prevent him from becoming a citizen and expose him to other restrictions of his civil rights. 329 U.S. at 221-22.

conviction is an insufficient collateral consequence."); *United States v. Case*, 684 F. Supp. 109, 113 (D.N.J.) ("[M]ere moral stigma of a conviction will not suffice [for coram nobis relief]."), *aff'd w/o opn.*, 866 F.2d 1413 (3d Cir. 1988).

In this extradition case, where Demjanjuk had already been extradited and his criminal conviction in Israel reversed, there are no collateral legal consequences to Demjanjuk. Indeed, the Sixth Circuit did not identify any.[9]

If the stigma exception is allowed to stand, substantial litigation can be expected to ensue. Criminal defendants who have been acquitted will challenge their indictments, extraditees will seek relief from their already-effected extraditions, civil litigants will continue to fight old battles that have ceased to have any real meaning, all on the basis of "stigma" alone. For this reason, certiorari should be granted, and the Sixth Circuit's decision should be reversed.

---

9 A close parallel can be found in *Kearns v. Turner*, 837 F.2d 336 (8th Cir. 1988). There, Kearns, a federal prisoner, filed a petition for a writ of habeas corpus, seeking to prevent his transfer from a federal prison to state custody for sentencing on a state charge. The transfer, he alleged, would violate the Interstate Agreement on Detainers Act. The district court dismissed the petition for failure to exhaust state remedies. Kearns was then transferred to state custody and sentenced to three years. On appeal, the Eighth Circuit affirmed the dismissal of the petition, stating:

> Insofar as Kearns sought to enjoin the transfer,... there is no longer a live controversy. Kearns has been transferred and sentenced; the matter is moot.

Id. at 338. It should be noted that despite the fact that there were serious collateral legal consequences to Kearns's transfer — he was sentenced to three years imprisonment — the case was found to be moot.

II.

IN APPLYING *BRADY V. MARYLAND* TO AN EXTRADITION CASE FOR THE FIRST TIME, THE SIXTH CIRCUIT BROADENED *BRADY* TO REQUIRE THE PRODUCTION OF EVIDENCE IRRELEVANT TO PROBABLE CAUSE

In applying *Brady v. Maryland*, 373 U.S. 83 (1963), for the first time to an extradition proceeding, the Sixth Circuit seems to have confused the narrow probable cause hearing that characterizes an extradition proceeding with a trial on the merits. The purportedly exculpatory evidence referred to by the Sixth Circuit would have been irrelevant to the probable cause showing and would have been inadmissible under normal extradition rules.

In order to prevent extradition proceedings from becoming mini-trials, this Court has long held that only evidence relating to the probable cause showing is admissible on the accused's case. Courts have defined such admissible evidence as "explaining" the probable cause showing and the inadmissible evidence as "contradicting" the showing. *See Collins v. Loisel*, 259 U.S. 309, 316-17 (1922) (Brandeis, J.); *Charlton v. Kelly*, 229 U.S. 447, 462 (1913).[10] While the distinction between contradictory and explanatory evidence has sometimes been elusive, it is plain that evidence that does not explain away, point to infirmities in or relate to the probable cause showing is not admissible. Thus, evidence about defenses such as insanity, *Charlton v. Kelly*, 229 U.S. 447, 462 (1913), or alibi, *Shapiro v Ferrandina*, 478 F.2d 894, 901 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973), or evidence "that someone other than the relator committed the offense", 2 M. Bassiouni, *International Extradition: United States Law and Practice* §5.5.1, at 558 (2d rev. ed. 1987), is inadmissible. And in

---

[10] Indeed, the extradition court in this very case held that contradictory evidence could not be admitted in the extradition hearing. *In re Demjanjuk*, 603 F. Supp. 1463, 1464-65 (N.D. Ohio 1984).

cases where evidence rebutting probable cause is admitted, it is done under limited circumstances — the evidence must "negate" or "obliterate" the factual showing of probable cause. *See In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978) (evidence is only admissible if it "negat[es] a showing of probable cause"), *aff'd sub nom. Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Shapiro v. Ferrandina*, 355 F. Supp. 563, 572 (S.D.N.Y.) (evidence is only admissible if it "tends to obliterate probable cause"), *modified*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977). The *Shapiro* court further held that "[t]he improbability or the vagueness of [probable cause] testimony may destroy the probability of guilt, *but the tendering of witnesses who testify to an opposite version of the facts does not.*" 355 F. Supp. at 572 (emphasis added).

The reason for such a rule is clear: the whole purpose of extradition is to avoid having the requesting nation try its case in two forums — in the United States and in its own courts. As a matter of comity, such a process would be improper .

The probable cause showing in Demjanjuk's extradition proceeding consisted of three eyewitness affidavits of Treblinka survivors, identifying Demjanjuk as the Treblinka guard Ivan the Terrible. 612 F.Supp. at 566. The purportedly exculpatory evidence consisted of statements of deceased Treblinka guards, which suggest that Ivan Marchenko, not Ivan Demjanjuk, might have been Ivan the Terrible, and an incomplete list of Treblinka guards on which Demjanjuk's name is absent. 10 F.3d at 350-51. None of the purportedly exculpatory materials relates to the eyewitness testimony at all. They do not "explain ambiguities or doubtful elements in the prima facie case." *Collins*, 259 U.S. at 315-16. They at best "testify to an opposite version of the facts," a version in which another person, not Demjanjuk, *might* be Ivan the Terrible of Treblinka. Such evidence does not "negate" or "obliterate" probable

cause as the cases require,[11] and is, accordingly, not admissible.[12]

Furthermore, there is no reason to believe that the purportedly exculpatory evidence could lead to admissible evidence. The declarants were dead and could not have testified at the extradition hearing. The documents could not be used for cross-examination purposes because the probable cause showing was based on affidavits— a perfectly proper procedure in an extradition case where the probable cause showing may be made on hearsay. 18 U.S.C. § 3091.

The rule set forth by this Court in *Brady*, which requires a prosecutor to produce, upon request, evidence favorable to a criminal defendant, is limited to the production of evidence which "is *material* either to guilt or to punishment." *Id.* at 104 (emphasis

---

[11] For this reason, the Sixth Circuit lacked jurisdiction to proceed it this matter. As this Court has stated, habeas review of an extradition order "is available only to inquire [1] whether the magistrate had jurisdiction, [2] whether the offense charged is within the treaty and, by a somewhat liberal extension, [3] *whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.*" *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (emphasis added). *See also Demjanjuk*, 776 F.2d at 576.

[12] The evidence would also have been inadmissible in the extradition hearing because it consists of hearsay documents. This Court has held that such evidence is inadmissible when offered by the accused. *In re Luis Oteiza y Cortes*, 136 U.S. 330 (1890). That principle has been sustained in a number of more recent cases, including the *Demjanjuk* extradition case. *See, e.g., United States v. Taitz*, 134 F.R.D. 288, 290 (S.D. Cal. 1991); *In re Koskotas*, 127 F.R.D. 13, 28 (D. Mass. 1989); *In re Demjanjuk*, 603 F. Supp. 1463, 1465 (N.D. Ohio 1984) (Demjanjuk not permitted to introduce evidence via affidavit); *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383, 388 (S.D. Cal. 1959) (*ex parte* affidavits submitted by accused were excluded). *See also First National City Bank of New York v. Aristeguiesta*, 287 F.2d 219, 226 (2d Cir. 1960) (dictum) (the opportunity afforded the demanding country to introduce *ex parte* depositions is not afforded the accused in an extradition proceeding), *vacated for mootness*, 375 U.S. 49 (1963).

added). In *Brady*, the Court found that because, under Maryland law, the favorable evidence in that case would not be *admissible* on the issue of guilt (but was relevant to punishment), the state court was correct in restricting the petitioner's retrial to the issue of punishment.

Hence, in order to trigger a Brady violation, the evidence not disclosed by the prosecution must not only be favorable, but also be admissible or lead to admissible evidence.[13] *See also United States v. Bagley*, 473 U.S. 667, 682 (1985) ("[E]vidence is material . . . if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.").[14]

Thus, even if *Brady* is applicable in extradition proceedings — a point on which *amici* take no position except to note that no other court of which we are aware has done so[15] and to note that the

---

[13] Indeed, the Sixth Circuit recognized this rule in *United States v. Philip*, 948 F.2d 241, 249 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1994 (1992). In that case, the court held that a *Brady* violation had not occurred when the prosecution in a criminal case did not produce a purportedly favorable videotape of an interview with one of the defendant's children, which would not have been admissible in the defendant's trial because the statements of the child were hearsay and the tape contained no information that might have led to admissible evidence.

[14] A similar rule applies with respect to discovery requests in an extradition. In a habeas corpus case, in which an extraditee asserted that the failure to provide him with certain discovery materials warranted granting him habeas relief, the court held: "Access to the requested discovery items would not have aided petitioner in challenging the critical rulings of the magistrate: that the charged offenses are covered by the treaty and that there is sufficient competent evidence to conclude that petitioner committed the crimes of which he is accused in Canada." *Peryea v. United States*, 782 F. Supp. 937, 940 (D. Vt. 1991), *aff'd w/o opn.*, 970 F.2d 896 (2d Cir. 1992).

[15] *See In re Koskotas*, 127 F.R.D. 13, 27 (D. Mass. 1989); *In re Singh*, 123 F.R.D. 108, 112 (D.N.J. 1987); *see also Caplan v. Vokes*, 649 F.2d 1336, 1342 n.10 (9th Cir. 1981) ("the accused [in an extradition proceeding] has no absolute right to introduce exculpatory evidence *and the government has no duty to do so* . . . .");

extradition to which this new doctrine applies was ordered nine years ago — *Brady* would not call for the production of the purportedly exculpatory evidence unless the nature of extradition proceedings were changed to make admissible evidence that is unrelated to the probable cause showing or unless *Brady* were expanded to require the production of inadmissible evidence or evidence that is unlikely to lead to admissible evidence.

Neither result is desirable. Restructuring extradition proceedings would turn such proceedings into full-blown trials, a result that this Court has repeatedly sought to avoid. In addition, allowing a virtual trial on the merits before extradition would put an undue burden on the requesting country.

Broadening *Brady* to include inadmissible evidence that is unlikely to lead to admissible evidence would be an exercise in futility. It makes no sense to require a prosecutor to produce evidence to a defendant in an extradition case that would do the defendant no good.

The Sixth Circuit's ruling would change the nature of an extradition proceeding from a hearing on a narrow issue — probable cause — into a full-blown criminal trial of the guilt or innocence of the person to be extradited. Such a result flies in the face of the precedents of this Court and other circuits and would radically restructure extradition proceedings in the United States, constitute a waste of judicial resources and not be properly deferential to the rights of the requesting country under the extradition treaty. The importance of this issue warrants this Court's review.

Merino v. United States Marshal, 326 F.2d 5, 13 (9th Cir. 1963) (holding *Brady* not applicable to extradition proceedings), *cert. denied*, 377 U.S. 997 (1964).

III.

THE SIXTH CIRCUIT'S CHARACTERIZATION OF CONTACTS BETWEEN THE JUSTICE DEPARTMENT AND JEWISH GROUPS AND INDIVIDUALS WARRANTS REVIEW BY THIS COURT

Amici are deeply concerned about the Sixth Circuit's characterization of the contacts between Jews and Jewish groups and OSI. Jews and Jewish groups — as well as non-Jews and non-Jewish groups — have been concerned about the presence of Nazi persecutors in the United States. As is their right, they have communicated with OSI and the Justice Department to ensure the efficient and effective handling of cases involving allegations of Nazi war crimes. Such contacts are perfectly normal.

It is commonplace for persons (including members of Congress) or groups interested in, for example, civil rights, women's rights or the environment, to contact the relevant units of the Justice Department to express their positions on policy or the handling of particular cases. This is true for supporters of John Demjanjuk as well.

The record is barren of any facts suggesting that Jews or Jewish groups urged OSI to withhold evidence, violate any law or rule of the court or win at any cost. In fact, the Special Master found that "pressures from outside OSI did not influence the [Government's] failure to disclose the required information." 10 F.3d at 354. Unless clearly erroneous, this finding must stand. Fed. R. Civ. Proc. 53(e)(2). Yet, without making any determination of error, the Sixth Circuit, in effect, overruled the finding.

The Sixth Circuit stated that "the presence of such pressure cannot be gainsaid." 10 F.3d at 354. (The word "such" is ambiguous — it refers either to outside pressure only or to pressure to withhold evidence.) The court went on to say:

> It is obvious from the record that the prevailing mindset at OSI was that the office must try to please and maintain very close relationships with various

> interest groups because their existence depended upon it.

Id. at 355. Without exception, the examples of interested parties cited by the Sixth Circuit were Jewish organizations and Jewish individuals .

According to the court, OSI's "attitude" was "to win at any cost." *Id.* The suggestion in the Sixth Circuit's decision that this purported attitude stemmed from pressure from Jewish groups and Jews[16] is contradicted by the finding of the Special Master.[17] *Amici* find the foregoing statements of the Sixth Circuit troubling because, regardless of intent and particularly because there is no basis in the

---

[16] The examples adduced by the Sixth Circuit to support its conclusion do no such thing. The court first cites a letter to the Attorney General from a Jewish Congressman, a former chair of the House Immigration Subcommittee. Although the letter states "we cannot afford the risk of losing" the Demjanjuk case, the context makes clear that his concern was about losing the case because of "lack of preparation and an inadequate understanding of the importance of the case." There is nothing in his letter calling for the Justice Department to violate the law or to withhold evidence or even, as the Sixth Circuit states, to prosecute Demjanjuk "hard." 10 F.3d at 354. Citing a lecture trip sponsored by ADL taken by Allan Ryan, Jr., the former director of OSI, three years after he left OSI, does not support the proposition that ADL urged OSI to withhold evidence or otherwise violate the law three years earlier or at any time. A former OSI director's statement that the Demjanjuk case was a "political hot potato" similarly does not prove that Jewish groups were asking OSI to adopt an "end justifies the means" approach to Nazi cases. Nor, finally, does Ryan's statement that the support of Jewish groups "cannot be taken for granted" imply that Jewish groups sought improper action by OSI.

[17] While the Court did not explicitly state that pressure from Jewish groups directly caused the Justice Department to withhold evidence, the juxtaposition of the Court's finding of pressure with (1) its conclusion that OSI needed to maintain very close relations "with [Jewish] groups because [OSI's] continued existence depended upon it, and (2) OSI's so-called "win at any cost" mindset creates the impression of a connection between these findings. 10 F.3d at 355.

record or in fact to support them, they serve to perpetuate the vicious stereotype that Jews wield inordinate and invidious power.

Courts must take special care not to nurture ethnic stereotypes. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992). *Amici*, therefore, urge that certiorari be granted under this Court's supervisory power over the lower federal courts for the purpose of reversing the Sixth Circuit on this point.

CONCLUSION

The Sixth Circuit has treated *Demjanjuk* as a special case, not subject to the jurisdictional or evidentiary restrictions of the ordinary extradition case. Unfortunately, such special treatment sets a precedent that can work untold mischief on the proper workings of extradition law. For the reasons set forth above and for the reasons set forth in the Petition, certiorari should be granted and the Sixth Circuit's decision should be reversed.

Respectfully submitted,

Elizabeth Holtzman
Counsel of Record
HERRICK, FEINSTEIN
2 Park Avenue
New York, NY 10016
(212) 684-1400

SANFORD HAUSLER
1568 59th Street
Brooklyn, NY 11219
(718) 633-0847

Attorneys for *Amici Curiae*

Dated: June 22, 1994